

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARLON DEWAYNE WALKER,

Defendant-Appellant.

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UNPUBLISHED

March 18, 2003

No. 236546

Muskegon Circuit Court

LC No. 00-045110-FC

Before: Whitbeck, C.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316, assault with intent to rob while armed, MCL 750.89, two counts of armed robbery, MCL 750.529, and four counts of possessing a firearm during the commission of a felony, MCL 750.227b.<sup>1</sup> The trial court sentenced defendant to a term of life imprisonment without the possibility of parole for first-degree murder, and concurrent terms of forty to sixty years' imprisonment for the assault with intent to rob and armed robbery convictions. The court also imposed two-year terms for each of the felony-firearm convictions. Defendant appeals as of right. We affirm.

This case arises from the early morning robbery of the Shultz Haus bar in Muskegon Heights. At the time of the robbery, a number of patrons were present in the bar. Although the majority of those patrons complied with the robbers' demands that they too turn over their money, one patron, Alfonso Loera, apparently refused to do so and became involved in a scuffle with defendant. During that fray defendant shot Loera three times as Loera lay on the floor of the bar. Defendant and his four accomplices then fled from the bar, after which they used the \$54 taken during the robbery to purchase and smoke marijuana. Loera died several weeks later from complications stemming from his gunshot wounds.

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<sup>1</sup> Although also convicted of one additional count each of assault with intent to rob while armed and felony firearm, those counts were dismissed by stipulation of the parties, the assault conviction being the predicate offense for both the felony murder and felony firearm convictions. See *People v Wilder*, 411 Mich 328, 342; 308 NW2d 112 (1981).

On appeal, defendant first argues that the trial court erred in refusing to permit him to offer evidence in support of a diminished capacity defense at trial. In doing so, however, defendant does not dispute that the trial court's decision in this regard was supported by our Supreme Court's decision in *People v Carpenter*, 464 Mich 223; 627 NW2d 276 (2001), wherein it was held that the defense of diminished capacity is no longer viable in Michigan because the Legislature, through MCL 768.36(3), has "demonstrated its policy choice that evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility by negating specific intent." *Carpenter*, *supra* at 237. Rather, defendant argues simply that *Carpenter* was wrongly decided. However, as noted by the prosecutor, that precedent binds both the trial court and this Court unless and until a higher authority takes action to overturn it. See *Boyd v WG Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993). Accordingly, the trial did not err in refusing to permit defendant to offer evidence in support of a diminished capacity defense at trial.

Defendant also argues that he is entitled to resentencing because the trial court failed, as required by MCL 769.34(3), to articulate "on the record" substantial and compelling reasons for exceeding the sentencing range recommended by the statutory sentencing guidelines for his assault and armed robbery convictions.<sup>2</sup> Defendant failed, however, to preserve this issue for appellate review by raising the issue in the trial court. We therefore review this unpreserved claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-763; 597 NW2d 130 (1999). We find no such error on the record before us.

Initially, we note that although at no time during the sentencing hearing did the trial court expressly state on the record that it had identified "substantial and compelling reasons" for the departure, the court did articulate a number of reasons for imposing such a lengthy sentence, including the role that drugs played in these crimes and defendant's apparent disregard for the value of life given the "totally senseless" nature of the killing. Defendant does not argue that these reasons did not justify the departure here, or that they were otherwise improper considerations. *People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000). In any event, because defendant is also serving a concurrent nonparoleable life sentence for his first-degree murder conviction, any failure of the trial court to expressly articulate the basis for its departure with respect to these lesser sentences does not constitute error affecting defendant's substantial rights. See *People v Turner*, 213 Mich App 558, 585; 540 NW2d 728 (1995), overruled on other grounds, *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001); *People v Passeno*, 195 Mich App 91, 102; 489 NW2d 152 (1992), overruled on other grounds, *People v Bigelow*, 229 Mich App 218, 581 NW2d 744 (1998). Accordingly, defendant is entitled to no relief.

We affirm.

/s/ William C. Whitbeck

/s/ Mark J. Cavanagh

/s/ Richard A. Bandstra

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<sup>2</sup> The sentencing guidelines for the subject offenses recommend a minimum sentence range of 171 to 285 months. As noted above, however, the trial court imposed concurrent sentences of forty to sixty years (480 to 720 months) for those offenses.